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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~1043~~ 81

JULIAN RILEY AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED,
Petitioners,

vs.

THE NEW YORK TRUST COMPANY, ADMINISTRATOR C.T.A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, AND COCA-COLA INTERNATIONAL CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

HIRAM C. TODD,
CLARENCE A. SOUTHERLAND,
DANIEL O. HASTINGS,
J. RICHARD BOWEN,
MARION SMITH,
Counsel for Respondents.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Writ of certiorari will not be granted where the Federal questions decided by the lower court have long been settled.[1] An application of this principle requires the denial of the writ in this case.

The only Federal questions decided by the Supreme Court of Delaware are summarized by it in its opinion as follows:

"It is sufficient to say that the Georgia judgment, as a judgment in rem, binds only the property within

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[1] *Supreme Court Rule 38*, Par. 5(a); *Fleming* v. *Fleming*, 264 U. S. 29; *Tidal Oil* v. *Flanagan*, 263 U. S. 444; *City of Boston* v. *Jackson*, 260 U. S. 309; *King* v. *West Virginia*, 216 U. S. 92; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308.

the control of the court which rendered it, and the property in controversy here is not within its control; and

"as a judgment in personam, it cannot bind the appellant, for it was neither a party to that judgment, nor was it in privity with a party."

There is certainly no doubt about either of these propositions.

(The petition points out that there was one dissent in the Supreme Court of Delaware. This dissenting Justice filed no opinion. We cannot assume that he disagreed with the above. It is far more probable that his dissent was as to findings of fact.)

(a) A judgment in *rem* "binds only the property within the control of the Court which rendered it". This is settled by:

Thormann v. *Frame*, 176 U. S. 350;
Deway v. *Des Moines*, 173 U. S. 193;
Johnson v. *Powers*, 139 U. S. 156;
Pennoyer v. *Neff*, 95 U. S. 714;
Cooper v. *Reynolds' Lessee*, 10 Wall. 308;
Boswell's Lessee v. *Otis*, 9 How. 336;
Salmon Falls Mfg. Co. v. *Midland Tire & Rubber Co.*, 285 Fed. 214 (C. C. A. 6);
34 C. J. 1174;
31 *Am. Jur.* 98, 99, 101.

(b) A judgment in *personam* "cannot bind" one who "was neither a party to that judgment, nor was it in privity with a party".

This, of course, is elementary, but the following cases may be referred to:

Hansberry v. *Lee*, decided Nov. 12, 1940, No. 29, — U. S. —, 61 S. Ct. 115;
Johnson v. *Powers*, 139 U. S. 156;
Brooklyn, etc., R. R. v. *National Bank*, 102 U. S. 14;

Sessions v. *Johnson*, 95 U. S. 347;
Humes v. *Scruggs*, 94 U. S. 22;
Ex parte Howard, 9 Wall. 175;
Harris v. *Hardeman*, 14 How. 334;
15 *R. C. L.*, 1006;
30 *Am. Jur.* 951.

Nor is there any doubt about the fact that the personal representative of the decedent's estate is in no such privity with the heirs or distributees as to make a judgment against the heirs or distributees *res adjudicata* as to the personal representative. So far as we know the authorities are unbroken to the effect that a personal representative is not in such privity.[2]

The Supreme Court of Delaware, in so far as the Federal questions in this case are concerned, merely announced the above established principles and applied them to the case then before it in the only way they could be applied, namely: by holding that since the New York Administrator c.t.a. of the decedent's estate was not a party to the Georgia proceedings nor in privity with a party, the judgment in such Georgia proceedings could not be pleaded as an absolute bar against such administrator.

The court expressly declined to pass upon the question as to whether the individual heirs who were parties to the Georgia judgment would be bound thereby in subsequent proceedings. It declined to pass on this because the question was not involved. The court says:

"That court in the cases cited, was not, nor are we here, called upon to consider the operation of a judg-

[2] *Howard* v. *Williams*, 228 Ky. 259, 14 S. W. 2d 1096; *Buchan* v. *Williamson*, 142 Ga. 198, 82 S. E. 548; *Green* v. *Brown*, 146 Ind. 1, 44 N. E. 805; *Chamberlain* v. *Fay, et al.*, 205 Ia. 662, 216 N. W. 700; *Forbes* v. *Douglass, Admr.* 175 Mass. 191, 55 N. E. 847; *Warren* v. *Hall's Exec.* 10 La. 377; *Johnson's Admr.* v. *Longmire*, 39 Ala. 143; *Cole, Admr.* v. *Lafontaine, et al.*, 84 Ind. 446; *Dorr, Exec.* v. *Stockdale, et al.*, 19 Ia. 269; Vol. 1 *Freeman on Judgments*, §492; 34 C. J. 1038.

ment in a probate proceeding in one jurisdiction as to an estoppel against one who, although a party, to that proceeding, undertakes in a proceeding in another jurisdiction, affecting the same decedent's estate, to raise again the question of the decedent's domicile."

Nor was the court called upon to consider whether, if in fact such heirs and legatees were individually bound, (a point which was not in this case, and as to which therefore all relevant facts were not developed) such fact could have been pleaded for the purpose of moulding the scope of the relief granted in this case.

The petitioners herein did not ask the court to determine that the distributees were bound by the Georgia judgment, and therefore that the relief in this equity suit be moulded to enable the petitioners to retain in Georgia that portion of the stock in question which could fairly be allocated as the interest of those heirs and legatees, if any, who upon a full inquiry were shown to have been bound, after making provision for New York creditors, taxes, etc. It is wholly unnecessary to inquire whether this could have been pleaded. Nothing of the kind was pleaded, and nothing of the kind was decided. The issue raised by the petitioner was that the Georgia judgment was an absolute bar against the New York administrator, although that administrator was not a party to the Georgia proceeding.[3] The court was

[3] *Roberts* v. *Bathurst*, 112 F. (2d) 543, pressed by the opposing brief involved the equitable principle of avoiding circuity of action. The state of facts there presented is most unusual in that the Florida Executrix was also the sole beneficiary of the insurance involved, and there were "no debts to be paid." In the case at bar New York tax claims against the estate are deeply involved. Indeed, the appointment of the administrator c.t.a. in New York was in large part based on the efforts of the State of New York to obtain an administration there on the estate of a citizen of New York to protect its just tax claims. Also there is no showing that there are no creditors of the estate. If the equitable principle of

called on the pass upon this contention only, and it did pass upon this contention in accordance with long settled principles of constitutional law. This Court will not grant the writ of certiorari to decide questions that were not raised in the court below by the parties, or decided by the Court.[4]

Nor was the court below called on to pass upon the question of whether upon the administration of this property in New York by the Surrogate's Court, the Georgia judgment can be set up as controlling the distributive interests of those who were parties to the Georgia case.

The issue involved in the case, namely, whether the Georgia judgment was an absolute bar against one not a party to the Georgia proceedings, was raised at an early state of the case by a motion on behalf of the Georgia executors for judgment upon the pleadings (the pleadings having set forth in full the Georgia proceedings). The matter was fully argued before the late Chancellor Wolcott, and was decided by him adversely to the Georgia executors (R. 134). His decision on the question, to the effect that the Georgia proceedings were not binding on the New York administrator, for the reason that the latter was not a party to those proceedings, was discussed and approved

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avoiding circuity of action could have been applied here at all, it could have been applied only to the extent of the interest of such distributees as were shown to be bound. It could, in no event, constitute a complete bar to a New York administration. Moreover, a determination of the extent of such interest could have been made only if the pleadings had raised such an issue. No such pleadings were filed in this case. Furthermore, the legal principle involved is not one of Constitutional law, and raises no Federal question. The principle is merely the equitable doctrine of avoiding circuity of action. Nothing in the Federal Constitution *requires* state courts to follow that principle or to apply it in a particular way.

[4] *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430; *N. W. Bell Tel. Co.* v. *Nebraska State Ry. Com.*, 297 U. S. 471; *Chandler* v. *Manifold*, 290 U. S. 665; *Dorrance, et al.* v. *Pennsylvania*, 287 U. S. 660.

by the Supreme Court of the State of Delaware.[5] The Supreme Court said, in part, (*New York Trust Co.* v. *Riley*, 16 A. (2d) 772, 787):

> "The late Chancellor, in Coca-Cola International Corporation *v.* New York Trust Company, supra [2 A. (2d) 290], accurately stated the legal principles by which the case must be governed. * * *
>
> The learned Chancellor was of opinion * * * that the appointment of the administrator c.t.a. in New York, as well as the appointment of the executors in Georgia, were essentially judgments in rem, final and conclusive as to property located in the appointing jurisdiction, but the property located in this jurisdiction was not a subject matter within the operation of either of those judgments, citing Overby *v.* Gordon, 177 U. S. 214, 20 S. Ct. 603, 44 L. Ed. 741. Expressing no opinion on the question whether the Georgia judgment might not be pleaded as an estoppel against a party who was cited to appear and did appear in the probate of the will in solemn form in the Court of Ordinary of Fulton County, Georgia, if such party were to seek elsewhere to relitigate against the executors the question of the Georgia domicile, the Chancellor proceeded to say that such contention could not be made in the case before him for the reason that the New York Administrator was neither a party to the Georgia proceeding nor in privity with such party; and he concluded that there was power in the appropriate Delaware tribunals to determine, so far as the property located in this State was concerned, where the deceased testatrix was domiciled at the time of her death to the end that the local effects might be sent to the seat of domiciliary administration."

[5] Chancellor Wolcott's holding and opinion are not even mentioned by petitioners. In the court below they made the patently baseless contention that Chancellor Wolcott and not, on the motion for judgment, decided any of the questions of *res judicata* involved in the case. It will be observed that this contention was overruled by the Supreme Court of Delaware.

As will be seen from the holdings both of the Court of Chancery and of the Supreme Court of the State of Delaware, the courts below were not called upon to pass upon the question of whether, upon the administration of the property in controversy by the Surrogate's Court of the State of New York, the Georgia judgment may be set up as controlling the distributive interests of those who were parties to the Georgia case. That question was neither raised nor decided below, nor is it before this Court for determination.

When and if such question is raised it will be appropriate for the parties thus sought to be bound by the Georgia judgment to present any considerations or evidence pertinent to whether that judgment was originally binding on them, and pertinent to whether anything has since occurred to relieve the bar of the judgment if it ever existed. That was not done in the present record because it was not involved in the present case.

It is true, as pointed out in the petition for certiorari, that the Supreme Court of Delaware determined both that the Georgia judgment was not binding on the New York administrator, and that in point of fact the decedent was domiciled in New York at the time of her death. Both questions were involved in the case and both were determined by the court. The petition for certiorari seems to find great significance in the fact that the Supreme Court of Delaware first determined as a matter of fact the issue of fact as to the decedent's domicile, and then second in order in its opinion discussed the contention that the Georgia judgment was a bar. We see no significance in this. The reverse order might or might not have been a more technically logical way to proceed. Surely, however, there is no Federal question involved here.

Had the Supreme Court of Delaware, after finding as a matter of fact that the decedent was domiciled in the

New York at the time of her death, denied to the State of New York the power to control the domiciliary administration of the decedent's estate, then indeed a very grave question would have been presented, because the Supreme Court of Delaware, had it rendered any such decision, would have departed from fundamental ideas which have long governed the relation of the States to each other. Assuming, as we must assume, since the Supreme Court of Delaware so found on adequate proof, that the decedent was a citizen of New York at the time of her death, there is no way possible under our constitutional system by which the State of Georgia, through proceedings in its own court, could have deprived the State of New York of the power in its courts of establishing a domiciliary administration of the decedent's estate.[6] There is no need, however, to grant the writ of certiorari where the court in this respect merely conformed to established constitutional principles as it did in the case at bar.

The petition for certiorari creates an inaccurate impression as to the nature of the New York proceedings in the Surrogate's Court. It repeatedly speaks of them as *ex parte*. Actually, the appointment of the New York Trust Company, both as temporary and as permanent administrator, was made after full notice in complete accordance with the New York statutes, through personal service

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[6] *Baker* v. *Baker-Eccles Co.*, 242 U. S. 394; *Burbank* v. *Ernst*, 232 U. S. 162; *Tilt* v. *Kelsey*, 207 U. S. 43; *Overby* v. *Gordon*, 177 U. S. 214; *Thormann* v. *Frame*, 176 U. S. 350; *Re Dorrance's Estate*, 170 A. 601 (N. J.):

Subject only to the right of a foreign state to administer property within its borders for the protection of its own citizens, the domiciliary representative becomes invested with the title to all of the personal property of the deceased for the purpose of collecting the effects of the estate, paying the debts and making distribution of the residue according to the law of the place of domicile or the directions of the will as qualified by law.

Wilkins v. *Elliott, Admr.*, 9 Wall. 740; *Vogel* v. *N. Y. Life Ins. Co.*, 55 F. (2d) 205, Cert. denied 287 U. S. 604; *Putnam* v. *Pitney*, 45 Minn. 242, 47 N. W. 790; 21 Am. Jur. 854; 11 R. C. L. 429, 430.

of citation on all parties in interest outside the State (R. 86). The notice was actual and as complete as it is possible to give to non-residents, and it is wholly misleading to speak of the proceedings thereafter as *ex parte*.

After hearing evidence fully the Surrogate's Court determined that the decedent was domiciled in New York at the time of her death (R. 127). It is possible that opposing counsel, when they speak of these proceedings being *ex parte*, merely mean that the opposing interest did not actually contest on the point of domicile. If so, however, the Georgia proceedings on which opposing counsel rely must also be spoken of as *ex parte* since no one there contested the issue of domicile. It appears from the report of that case [7] that Hungerford's counsel felt that domicile was not in issue there and offered no evidence with respect thereto. The Supreme Court of Georgia treated domicile as in issue, but there must have been substantial basis for the contrary view under the Georgia law, since the Chief Justice of that Court filed a dissenting opinion on this particular point. However that may be, the only courts in which an actual contest as to the decedent's domicile has ever been tried are the Delaware courts, and the final determination there has been that the domicile was in New York.

Nor is any clear idea of the proceedings in New York given by a statement which omits to say that before the appointment of the permanent administrator the State of New York through its tax authorities had intervened to seek an administration in New York of the estate of a citizen domiciled in New York so that its just claims to inheritance and other taxes could be protected (R. 76). With reference to this the Supreme Court of Delaware appropriately says:

> "The appellant, however, is far more than being the representative of a mere creditor or tax claim-

[7] *Hungerford* v. *Spalding*, 183 Ga. 547.

ant. Any claim that the State of New York may have for inheritance taxes or other taxes is not the basis of its right to be heard on the question of domicile. That right proceeds from the fact that the decedent was its domiciled citizen at the time of her death; and the appellant, appointed by authority of its proper court, is its arm to gather together, in so far as is permitted by law, the personal property of the deceased, and to administer and distribute the property according to her will and the laws of the State. Being the seat of domiciliary administration, it is not compelled to press its claim for taxes in a jurisdiction of ancillary administration."

It is impossible to find any novel or unsettled principle of law in this statement.

As a matter of fact, the action of the Delaware Court having been correctly understood, and a correct statement of the issues actually involved in that court having been made, it becomes too obvious for argument that on the supposed Federal questions the court merely applied long established principles of law. There is no occasion for this Court to burden itself with another case in order to declare that which is already definitely settled.

Respectfully submitted,

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